

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:)	
)	
John M. Dudley)	
d/b/a Phenix Lumber Company)	CONSENT ORDER NO. <u>18-XXX-CAP</u>
Phenix City, Russell County, Alabama)	
)	
<u>ADEM Air Facility ID No. 211-S001</u>)	

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter, “the Department” and/or “ADEM”) and John M. Dudley, d/b/a Phenix Lumber Company (hereinafter, “the Permittee”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 to 22-28-23 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto.

STIPULATIONS

1. John M. Dudley, d/b/a Phenix Lumber Company (hereinafter, the “Permittee”) is the owner and/or operator of a sawmill (hereinafter, the “Facility”), ADEM Air Division Facility No. 211-S001, located in Phenix City, Russell County, Alabama.
2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).
3. Pursuant to Ala. Code §§ 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401 to 7671q, as amended. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 to 22-28-23 (2006 Rplc. Vol.).

4. On January 10, 2017, the Department issued Major Source Operating Permit No. 211-S001 (hereinafter, the "Permit") to the Permittee, which authorized the operation of the significant air emissions sources at the Facility.

5. Permit Proviso No. 27 states:

This permit shall be kept under file or on display at all times at the site where the facility for which the permit is issued is located and shall make the permit readily available for inspection by any or all persons who may request to see it. [ADEM Admin Code r. 335-3-14-.01(1)(d)].

6. Permit Proviso Nos. 21(a), 5(b) for emission Unit No. 001, 5(b) for Emission Unit No. 004, and 5(b) for Emission Unit No. 005 require that the Permittee to submit a Semiannual Monitoring Report to the Department no later than 60 days after the end of each semiannual reporting period to clearly identify all instances of deviations from the permit requirements.

7. Permit Proviso No. 4(b) for emission Unit No. 001 states:

At least once daily during daylight hours while the boiler is operating, a qualified visible emissions observer shall determine the instantaneous opacity of the exhaust stack. Within 30 minutes of observing instantaneous visible emissions greater than 10% opacity, a qualified visible emissions observer shall conduct a Method 9 visible emissions observation (VEO) for a minimum of 12 minutes. [ADEM Admin Code r. 335-3-16-.05(c)].

8. Permit Proviso No. 5(a) and (b) for emission Unit No. 001 states:

The permittee shall maintain records of emission monitoring performed in a permanent form on-site and available for inspection for at least five (5) years from the date of generation of each record. These records shall include:

a) The date, time, and results of each daily opacity

- observation and, if required, Method 9 VEO;
- b) The date(s), nature, and results of any corrective action taken when greater than 10% opacity was determined by a Method 9 VEO;

9. Permit Proviso No. 2(c) for emission Unit No. 001 states:

The permittee shall conduct a performance tune-up of this boiler on a biennial basis. The initial tune-up was conducted on May 7, 2015. Each subsequent tune-up shall be conducted no more than 25 months after the previous tune-up. If the unit is not operating on the required date for a tune-up, the tune-up must be conducted within one week of startup.

10. Permit Proviso Nos. 5(a)(i) for Emission Unit No. 001, 5(a)(i) for Emission Unit No. 004, and 5(a)(i) for Emission Unit No. 005 require the recording of daily observations of the cyclones for greater than normal emissions.

DEPARTMENT'S CONTENTIONS

11. On September 14, 2017, the Department conducted an inspection of the Facility and noted the following:

- A. The Permittee was unable to locate its Permit.
- B. The Permittee was unable to produce the visual emissions records for the wood-fired boiler and stated it did not have a certified observer on staff.
- C. The Permittee was unable to produce the biennial boiler tune-up report for the boiler.
- D. The Permittee was unable to produce the cyclone visual observation records for the sawmill and planer mill.
- E. The Permittee was asked about the Semiannual Monitoring Report that the Department had not yet received and it was unable to produce the report or a copy of it.

12. On September 20, 2017, the Department issued Permittee a Notice of Violation (hereinafter, the "NOV") for the boiler for failing to document daily visible emissions

observations, failing to produce the biennial tune-up report, failing to document cyclone inspections for both the sawmill and planer mill, failing to submit a semiannual monitoring report, and for the inability to locate PLC's current Major Source Operating Permit.

13. On September 20, 2017, the Department received the Semiannual Monitoring Report, which was due to be received on August 29, 2017.

14. On October 11, 2017, the Department received the Permittee's response to the NOV, which indicated that it had not been conducting the required monitoring and recordkeeping, in violation of the Permit.

15. Pursuant to Ala. Code §22-22A-5(18)c., *as amended*, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATION: The Department considers the Permittee's failure to adhere to recordkeeping and reporting requirements of the Permit to be serious violations.

B. THE STANDARD OF CARE: The Permittee did not exhibit the requisite standard

of care to comply with the Permit.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department is not aware of any economic benefits the Permittee may have incurred as a result of these alleged violations.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: There are no known environmental effects to mitigate as a result of the alleged violations.

E. HISTORY OF PREVIOUS VIOLATIONS: The Permittee's history of air violations with the Department is as follows:

- (1) On June 6, 1986, the Department issued Permittee a NOV for open burning.
- (2) On September 18, 1986, the Department issued Administrative Order No. 86-112-AP to the Permittee for open burning.
- (3) On April 14, 1987, the Department issued Administrative Order No. 87-045-AP to the Permittee to include monthly reporting for Administrative Order No. 86-112-AP.
- (4) On June 22, 1987, the Department issued Permittee a NOV for violating the terms of Administrative Order No. 86-112-AP.
- (5) On September 8, 1987, the Department issued Permittee a NOV for violating the terms of Administrative Order No. 86-112-AP.
- (6) On February 23, 1988, the Department issued Consent Order No. 88-029-AP to the Permittee for open burning, assessing a civil penalty in the amount of \$7,500.00.
- (7) On November 4, 1988, the Department issued Consent Order No. 89-008-AP to the Permittee to modify Consent Order No. 86-112-AP.
- (8) On May 15, 1998, the Department issued Permittee a NOV for open burning.

(9) On September 28, 1998, the Department issued Consent Order No. 98-128-CAP to the Permittee for open burning assessing a civil penalty in the amount of \$8,500.00.

(10) On April 24, 2001, the Department issued Permittee a NOV for open burning and failure to respond to a Warning Letter.

(12) On June 30, 2014, the Department issued Permittee a NOV for excessive opacity from the wood-fired boiler exhaust.

(13) On January 12, 2015, the Department issued Consent Order No. 15-032-CAP to the Permittee for excessive emissions from the Boiler stack, a lack of recordkeeping for the Kilns, and reporting related to the Kilns, assessing a civil penalty in the amount of \$7,500.00.

(14) On November 6, 2015, the Department issued Administrative Order 16-014-AP to the Permittee for excessive emissions of air pollutants and failure to maintain and report Kiln production records to the Department, assessing a civil penalty in the amount of \$30,000.00.

(15) On March 24, 2016, the Department issued Permittee a NOV for failing to submit the annual Kiln production report required by Air Permit No. X005.

(16) On April 22, 2016, the Department sent an inquiry letter to the Permittee regarding its failure to respond to the NOV dated March 24, 2016.

(17) On August 25, 2016, the Department issued Consent Order No. 16-097-CAP to the Permittee for failure to maintain and report Kiln production records at the Facility, assessing a civil penalty in the amount of \$10,000.00.

F. THE ABILITY TO PAY: The Permittee has demonstrated an inability to pay the civil penalty for the violations cited in Paragraph Nos. 11-14 above.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty

to resolve this matter amicably without incurring the unwarranted expense of litigation.

16. The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code § 22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement and, based upon the foregoing and attached contentions, has concluded that the civil penalty herein is appropriate (*See* "Attachment A", which is hereby made a part of the Department's Contentions).

17. The Department neither admits nor denies the Permittee's contentions, which are set forth below. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

PERMITTEE'S CONTENTIONS

18. The Permittee neither admits nor denies the Department's contentions. The Permittee consents to abide by the terms of this Consent Order and to pay the civil penalty assessed herein.

ORDER

THEREFORE, the Permittee, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code §22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement, and has determined that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Permittee agree to enter into this ORDER with the following terms and conditions:

A. The Permittee agrees to pay to the Department a civil penalty in the amount of

\$24,000.00 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Payments will be made in twenty-four equal installments, with payments being due on the 15th of each month, beginning within forty-five days of the effective date of this Consent Order. Failure to pay the civil penalty within the specified timeframe from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Permittee agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. The Permittee agrees to bring Facility into compliance with the terms, limitations, and conditions of the Permits, and Department's regulations.

D. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

E. The parties agree that this Consent Order, subject to the terms of these presents and subject to provisions otherwise provided by statute, is intended to operate as a full resolution of the violations which are cited in this Consent Order.

F. The Permittee agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

G. For purposes of this Consent Order only, the Permittee agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Permittee also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Permittee shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Permittee, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Permittee) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Permittee, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

H. The Department and the Permittee agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the Facility which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and the Permittee shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

I. The Department and the Permittee agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Permittee does hereby waive any hearing on the terms and conditions of same.

J. The Department and the Permittee agree that this Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

K. The Department and the Permittee agree that final approval and entry into this Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Order.

L. The Department and the Permittee agree that, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

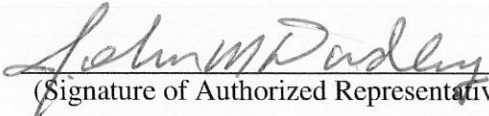
M. The Department and the Permittee agree that any modifications of this Order must be agreed to in writing signed by both parties.

N. The Department and the Permittee agree that, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Permittee of its obligations to comply in the future with any permit.

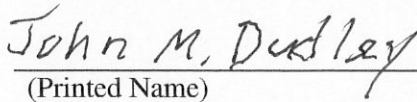
Executed in duplicate, with each part being an original.

JOHN M. DUDLEY
d/b/a PHENIX LUMBER COMPANY

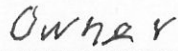
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ENVIRONMENTAL MANAGEMENT

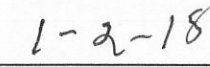

(Signature of Authorized Representative)

Lance R. LeFleur
Director


(Printed Name)

Date Executed


(Printed Title)


Date Signed

Attachment A

**John M. Dudley, d/b/a
Phenix Lumber Company
Phenix City, Russell County**

ADEM Air Facility ID No. 211-S001

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Unable to find Permit	1	\$5,000	\$2,500		
Lack of boiler VE records, certified observer, and cyclone inspection records	3	\$15,000	\$7,500		
Lack of biennial boiler tune-up report	1	\$2,500	\$2,500		
Late Semiannual Monitoring Report (SMR)	1	\$1,500	\$1,000		Total of Three Factors
TOTAL PER FACTOR		\$24,000	\$13,500	\$37,500	\$75,000

Adjustments to Amount of Initial Penalty	
Mitigating Factors (-)	
Ability to Pay (-)	-\$51,000
Other Factors (+/-)	
Total Adjustments (+/-) Enter at Right	-\$51,000

Economic Benefit (+)	
Amount of Initial Penalty	\$75,000
Total Adjustments (+/-)	-\$51,000
FINAL PENALTY	\$24,000

Footnotes

* See the "Department's Contentions" portion of the Order for a detailed description of each violation and the penalty factors.